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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

WESTVACO CORPORATION, PACKAGING CORPORATION OF AMERICA, and GEORGIA-PACIFIC CORPORATION,

Petitioners,

vs.

ADAMS EXTRACT COMPANY, et al.,

Respondents.

RESPONSE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Respondents Weyerhaeuser Company and Willamette Industries, Inc., in concurrence with petitioners, respectfully pray that a writ of certiorari issue to review the judgment in this case entered by the United States Court of Appeals for the Fifth Circuit on October 30, 1979.

QUESTIONS PRESENTED

1. Is there a right of contribution so that an antitrust defendant is not faced with the risk of having to bear the entire burden of alleged damages which are only partially attributable to him?

2. Where settlements are involved, is contribution's goal of equitable apportionment of damages among defendants best achieved by carving-out from total damages that share attributable to the settling defendants?

STATEMENT OF THE CASE

Respondents adopt and incorporate by reference petitioners' Statement of the Case.

REASONS FOR GRANTING THE WRIT

1.

There is a square conflict among the Circuits on the issue of contribution in antitrust cases which, unless resolved, will lead to forum-shopping and other abuses.

As petitioners point out, the issue of equitable apportionment of damages among antitrust defendants has produced a clear split of authority among the Circuits. The first Court of Appeals to decide the issue was the Eighth Circuit, which reasoned that fairness requires such equitable apportionment and therefore held that a right of contribution exists in antitrust cases. *Professional Beauty Supply, Inc.* v. *National Beauty Supply, Inc.*, 594 F.2d 1179 (8th Cir. 1979), *en banc rehearing denied* (April 17, 1979).[1] The Fifth Circuit, however, stated that it was "unable to agree" with the Eighth Circuit's decision and held that antitrust defendants have no right to contribution. *Wilson P. Abraham Construction Corp.* v. *Texas Industries,*

[1] In *Heizer Corp.* v. *Ross*, 601 F.2d 330, 331-34 (7th Cir. 1979), the Seventh Circuit cited *Professional Beauty Supply* with approval and adopted its reasoning in holding that there exists a cause of action for contribution arising out of a Rule 10b-5 case.

Inc., 604 F.2d 897, 900 (5th Cir. 1979), *en banc rehearing denied* (Nov. 29, 1979).[2] The Tenth Circuit also initially rejected the Eighth Circuit's decision, but recently decided to reconsider the question *en banc*. *Olson Farms, Inc.* v. *Safeway Stores, Inc.*, 1979-2 Trade Cas. 79,699 (10th Cir. 1979), 5 Trade Reg. Rep. (CCH) ¶ 62,995, *en banc rehearing granted* (Dec. 27, 1979).[3]

One especially troublesome consequence of the present division among the Circuits on this issue is the obvious invitation to forum-shop.[4] Particularly in class actions such as this, in which the alleged damages are enormous, plaintiffs undoubtedly will file suit only in those Circuits in which each defendant will be faced with the risk of having to bear the full amount of alleged damages. This will be done to take advantage of the undeniable settlement coercion that results.[5] To eliminate this possibility and to provide much needed

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[2] The Fifth Circuit panel assigned to this case considered itself bound by *Abraham* and affirmed the district court's dismissal of contribution claims, without analysis, in an unpublished *per curiam* opinion. *In re Corrugated Container Antitrust Litigation*, No. 79-2439 (5th Cir. Oct. 30, 1979).

[3] Of the three judges on the original *Olson Farms* panel, the two members of the Tenth Circuit split their votes; one of them filed a dissenting opinion which agreed with *Professional Beauty Supply*. The third judge, sitting by designation, wrote the panel opinion.

[4] The forum-shopping potential is illustrated by recent developments in this case. In light of *Professional Beauty Supply*, defendant The Mead Corporation filed a contribution action in the Eighth Circuit (D. Minn.). The action was transferred to the Fifth Circuit (S.D. Tex.), where it was dismissed. Mead has moved for reconsideration, arguing that Eighth Circuit law (allowing contribution), not Fifth Circuit law (denying contribution), governs its claims. *See Van Dusen* v. *Barrack*, 376 U.S. 612 (1964); *Berry Petroleum Co.* v. *Adams & Peck*, 518 F.2d 402 (2d Cir. 1975); *In re Plumbing Fixtures Litigation*, 342 F. Supp. 756 (J.P.M.L. 1972).

[5] Even the District Court in denying contribution in this case recognized the effect of the risk of enormous damages being assessed against a single defendant: "That this possibility is inherently coercive is undisputable . . . ." *In re Corrugated Container Antitrust Litigation*, 1979-1 Trade Cas. 77,878, 77,879 (S.D. Tex. 1979).

guidance to the lower courts on this issue, the Court should grant the writ. *See* S. Rep. No. 96-428, 96th Cong., 1st Sess. 29 (1979) (separate statement by Senators Metzenbaum and Kennedy).

2.

The important issue of equitable apportionment of damages among antitrust defendants should be decided by this Court, especially because serious abuses in the settlement process have developed.

The issue of equitable apportionment of damages is a matter of exceptional significance to parties in antitrust actions and raises questions of fundamental fairness concerning certain practices which have developed in the settlement process.[6] In the absence of such apportionment, plaintiffs in large class actions can enter into relatively cheap, early settlements with the most vulnerable defendants. The plaintiffs can then pursue other defendants for steadily increasing and enormously greater settlement amounts on the threat of liability for all class damages alleged. Defendants who believe they are innocent—and therefore are reluctant to settle at all and certainly unlikely to settle early—are confronted with the Hobson's

[6] As a recent ABA Antitrust Section Report notes, "While there exists in any proceeding a manifest unfairness in exposing parties to substantial liability whimsically imposed, the result of such exposure in large national class action litigation has been overwhelming. Small and regional defendants, maintaining total innocence of wrongdoing and a desire for a trial on the merits, have been confronted with the risk of massive liability based on the national sales of larger defendants. Many such defendants have, as a practical matter, been forced to settle without regard to liability or damage caused. Far from being a hypothetical scenerio, . . . this is a very real problem faced by many companies." American Bar Association, Section of Antitrust Law, *Report on Contribution with Legislative Recommendation* 4 (1979). (Messrs. Kempf and Garten, signatories to this Response, were members of the ABA task force that prepared the initial draft of the Report).

choice of paying an extortionate settlement, at rates far higher than the early settlors, or risking a judgment in the billions of dollars if they go to trial. The enormity of this potential liability is such that, as a practical matter, many innocent defendants are coerced into settlement.[7]

Petitioners' brief graphically illustrates the unfair settlement coercion in this case. One by one, defendants settled for steadily increasing amounts per market share point as the threat of liability for the entire alleged damages grew with each new settlement.[8] In short, the history in this case is one of settlements reached under coercion and without regard to the merits of the lawsuit.[9]

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[7] The facilitation of speedy settlements cannot, of course, justify a rule against equitable apportionment. As this Court stated in *United States* v. *Reliable Transfer Co.*, 421 U.S. 397, 408 (1975):

> "[A]t bottom, [this argument] asks us to continue the operation of an archaic rule because its facile application out of court yields quick, though inequitable, settlements, and relieves the courts of some litigation. Congestion in the courts cannot justify a legal rule that produces unjust results in litigation simply to encourage speedy out-of-court accommodations."

[8] *See generally* S. Rep. No. 96-428, 96th Cong., 1st Sess. 14-16 (1979) (discussing the unfair "whipsaw" settlements in this litigation). These respondents are all too familiar with the scenario since—unlike petitioners—they have already capitulated to that coercion, paying more than $50 million between them. Respondent Willamette was not even indicted by the federal grand jury which investigated the corrugated container industry. Respondent Weyerhaeuser pleaded *nolo contendere* to the charges brought against it, and the three Weyerhaeuser employees who stood trial were found not guilty.

[9] Opposition to a rule of equitable apportionment based on speculation about its impact on deterrence misses the mark. The issue in this case is not deterrence of the guilty but the imperative need to preserve the opportunity for defendants to defend themselves on the merits at trial. In any event, a rule allowing equitable apportionment

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In *Professional Beauty Supply*, where no settlements were involved, equitable apportionment of alleged damages was assured by allowing a right of contribution. In the present action, where some defendants have settled and others have not, equitable apportionment—the objective of contribution—is best achieved through "carve-out" or "claim-reduction." Under this approach, which would eliminate coercion in the settlement process, claims against non-settling defendants would be reduced by carving out, from the potential liability non-settling defendants would otherwise face, that portion of the liability attributable to the settling defendants. Implementation of the Eighth Circuit's *Professional Beauty Supply* ruling in another antitrust case involving settling and non-settling defendants was achieved in precisely this fashion. *Little Rock School Dist.* v. *Borden, Inc.*, 1980-1 Trade Cas. 77, 251 (E.D. Ark. 1979), 5 Trade Reg. Rep. (CCH) ¶ 63,059.[10]

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footnote concluded from preceding page

actually enhances deterrence, as several courts have concluded. *E.g.*, *Professional Beauty Supply, Inc.* v. *National Beauty Supply, Inc.*, 594 F.2d 1179, 1185 (8th Cir. 1979); *Heizer Corp.* v. *Ross*, 601 F.2d 330, 332 (7th Cir. 1979); *Leger* v. *Drilling Well Control, Inc.*, 592 F.2d 1246, 1249 (5th Cir. 1979); *Alexander & Baldwin, Inc.* v. *Peat, Marwick, Mitchell & Co.*, 385 F. Supp. 230, 238 (S.D.N.Y. 1974). *See also Olson Farms, Inc.* v. *Safeway Stores, Inc.*, 1979-2 Trade Cas. 79,699 (10th Cir. 1979), 5 Trade Reg. Rep. (CCH) ¶ 62,995 (dissenting opinion), *en banc rehearing granted* (Dec. 27, 1979).

[10] *See Luke* v. *Signal Oil & Gas Co.*, 523 F.2d 1190 (5th 1975) *(per curiam); Gomes* v. *Brodhurst*, 394 F.2d 465 (3d Cir. 1968); *Judson* v. *Peoples Bank & Trust Co.*, 17 N.J. 67, 110 A.2d 24 (1954) (Brennan, J.).

CONCLUSION

At stake here is whether the law will tolerate a rule under which an antitrust defendant is faced with the risk of having to bear the entire burden of alleged damages which are only partially attributable to him, and, as a result, can be coerced to pay exorbitant sums unrelated to the merits of plaintiffs' claims. The undersigned respondents join petitioners in urging that certiorari be granted to decide this important issue of federal law on which the Circuits are in conflict.

Respectfully submitted,

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